Casino Ready Mix, Inc. ***and*** **Building Trades Organizing Project, on behalf of Teamsters, Chauffeurs, Warehousemen and Helpers, Local 631, affiliated with International Brotherhood of Teamsters, AFL–CIO, and International Union of Operating Engineers, Local 12, AFL–CIO.** Case 28–CA–14536

August 27, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On September 18, 1998, Administrative Law Judge Frederick C. Herzog issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] only to the extent consistent with this Decision and Order.

The Respondent is engaged in the preparation, sale, and distribution of ready-mix concrete in Las Vegas, Nevada. In April 1997,[3] the Respondent was hiring truckdrivers and advertising that fact in local newspapers. Three of the Union's organizers applied for driver positions: Charles Phillips in late March, and Bill Dooley and Wayne King in early April. Phillips was formally hired in April, but was not assigned any work until August. Dooley and King were not hired. The Respondent hired four other truckdriver applicants before the end of April.

The judge found that Phillips was unlawfully denied assignments and Dooley and King were unlawfully refused employment because of their union status. In addition, the judge found that during April Larry Hildebrand, an alleged agent and statutory supervisor of the Respondent, interrogated and threatened an employee in violation of Section 8(a)(1), and that subsequently, Gary Bale, the Respondent's owner and president, also unlawfully threatened employees.

We disagree with the judge that the evidence substantiates the alleged violations committed by Hildebrand, and we will dismiss these portions of the complaint. We do agree that Bale violated Section 8(a)(1), and that the Respondent violated Section 8(a)(3) concerning Phillips, Dooley and King, but only to the extent consistent with our analyses below.

1. Employee Paul Swisher, a witness for the General Counsel, testified that during a truck ride in mid-April, alleged Supervisor Hildebrand interrogated him about his union membership, threatened that the Respondent would close down its Nevada operation to avoid unionization, and stated that the Respondent would not hire union drivers. After the judge found that Hildebrand was a statutory supervisor and agent, he relied solely on Swisher's testimony in finding that Hildebrand's statements violated Section 8(a)(1). However, during the Respondent's cross-examination of Swisher at the hearing, the judge pronounced that Swisher was not a believable witness. Among other things, the judge stated on the record that Swisher "is clearly not a reliable witness for any detail," and that "I'd be a fool to rely upon anything [Swisher] says that has anything to do with the detail. Or even if it's not a detail." And finally, the judge said "I've already seen enough of [Swisher] to know his credibility is shot."

In short, the judge emphatically discredited all of Swisher's testimony at the hearing. It is reasonable to infer that the Respondent took account of this in its defense of the allegations involving Hildebrand. The judge did not subsequently withdraw his characterizations of Swisher's testimony, provide timely notice to the Respondent that he might rely on Swisher's testimony, or explain why he nevertheless credited him in his decision.

In these circumstances, we find that Swisher's testimony remains discredited, and thus the evidence regarding statements made by Hildebrand is no longer competent to support the alleged violations of Section 8(a)(1). Accordingly, these allegations are dismissed. In light of this determination, we find it unnecessary to consider the judge's findings that Hildebrand was both a statutory supervisor and an agent of the Respondent, as his status is not relevant to any other aspect of this proceeding.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We observe that the judge's decision incorporates substantial portions of the Charging Party's posthearing brief. While this practice may raise questions about the independence of a judge's analysis, it is not inherently prejudicial or otherwise reversible error. Based on a careful review of the record, we are satisfied that the judge provided an independent analysis of the factual issues and legal arguments in the case. Accordingly, we find that disregard of his findings is not warranted. See *Waterbury Hotel Management LLC*, 333 NLRB 482 (2001), and cases cited there.

[3] All dates are in 1997.

2. Employee Scott Newcomb testified that, in late summer or early fall 1997, Gary Bale, the Respondent's owner and president, told him that the Company would never allow the Union to represent its employees, that instead he would either move the Respondent's Las Vegas operation or replace the truckdrivers with owner-operators. Bale did not testify at the hearing. The judge credited Newcomb's testimony and drew an adverse inference from the Respondent's failure to produce Bale as a witness.[4] He concluded that Bale's statement violated Section 8(a)(1), and also demonstrated the Respondent's animus against the Union, a factor relevant to the complaint's 8(a)(3) allegations. In its exceptions, the Respondent contends that the adverse inference and the finding of a violation are inappropriate because the General Counsel never alleged that Bale's statement was an unfair labor practice.

"It is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). The Respondent is correct that the General Counsel made no specific allegation that Bale's statement violated the Act. However, the complaint did allege that Bale was the president of the Company, a statutory supervisor, and an agent acting on the Respondent's behalf. Thus, Respondent was on notice that the General Counsel would hold the Respondent accountable for conduct committed by Bale. Moreover, as the judge found, Bale's statement clearly demonstrated union animus; thus, it was plainly relevant to the complaint's allegations that the Respondent discriminated against union members in its employment decisions. Finally, as indicated above, the complaint alleged similar threats by Hildebrand.

In these circumstances, we find that there is a close connection between Bale's statement and the subject matter of the complaint. In addition, the Respondent did not object to Newcomb's testimony and had an opportunity for cross-examination.[5] We therefore find that the issue was fully and fairly litigated. Accordingly, we reject the Respondent's exception and affirm the judge's finding that Bale's statement was a threat in violation of Section 8(a)(1). See, e.g., *FiveCAP, Inc.*, 331 NLRB 1165, 1184 (2000); *Williams Pipeline Co.*, 315 NLRB 630 (1994).

3. As stated above, the judge concluded that the Respondent discriminatorily refused to assign work to Phillips and discriminatorily refused to hire Dooley and King. While the judge's decision was pending on exceptions, the Board issued *FES*, 331 NLRB 9 (2000). In that decision, the Board, among other things, clarified the legal elements of a discriminatory refusal-to-hire violation. The Board also indicated that the principles set forth in that decision would be applied to all relevant pending cases. Id. at fn. 6.

On June 13, 2000, the Board invited the parties in this case to file briefs addressing the applicability of the *FES* analytical framework to the refusal-to-hire issues raised by the complaint, including whether the record is sufficient for such an analysis. The General Counsel responded to the Board's invitation, contending that the record is adequate for an application of the *FES* analysis. The Charging Party and the Respondent did not respond. It is thus apparent that all the parties concede that the record is sufficient, and, on our careful review of the record, we agree. As discussed below, we affirm the judge's 8(a)(3) findings.

In *FES* the Board defined the elements of a refusal-to-hire violation:

> To establish a discriminatory refusal to hire, the General Counsel must, under the allocation of burdens set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), first show the following at the hearing on the merits: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation.

331 NLRB at 12 (footnote references omitted).

As indicated above, the Respondent did not refuse to employ Phillips, but it did refuse to assign him work once he was formally hired. When Phillips applied for a driver position at the Respondent's office on March 28, he did not reveal that he was a union organizer. He was hired on April 8. Soon thereafter, the Respondent found

[4] The Charging Party moved to strike from the Respondent's exceptions brief the contention that Bale was out of state at the time of the hearing, and that it would have been burdensome and costly to provide his testimony to counter that of Newcomb. On review, we agree that the Respondent offered no explanation on the record for Bale's absence, and accordingly, we grant the motion to strike.

[5] In fact, it did cross-examine Newcomb on other matters, but chose not to address his testimony concerning Bale.

out that he was an organizer, and the Respondent admitted at the hearing that it did not assign work to him specifically because of that fact. Phillips did not receive work assignments until on or about August 15, after unfair labor practice charges had been filed. We find, based primarily on the Respondent's admission, that the refusal to assign work to Phillips was discriminatory and violated Section 8(a)(3) and (1). As discussed below, we also find that the Respondent's discrimination against Phillips because of his union status lends support to a finding of antiunion animus with respect to the complaint allegations involving Dooley and King.

Alleged discriminatees Dooley and King applied for driver positions on April 8, when the Respondent was advertising to hire drivers. Both wore shirts identifying themselves as organizers for the Union as well as baseball caps with union logos. Each stated his organizer status on his application; Dooley added on his that he intended to organize the Respondent's employees. Although the Respondent accepted their applications, they were told that the Company was not hiring at that time, and in fact they were not hired. The Respondent hired four other drivers between April 8 and 21.

The Respondent's newspaper advertisements required that truckdriver applicants "must have CDL (a chauffeur's license) with clean record. Must know pneumatics." Dooley had 9 years experience in the ready-mix concrete industry and a CDL with all required endorsements. The Respondent admitted that Dooley was qualified for the driver position being advertised. King's qualifications were comparable to Dooley's: 6 years experience in the ready-mix industry and a CDL with all required endorsements. The Respondent does not dispute, and we find, that King was qualified for the advertised position as well.

At about the time that King and Dooley applied, the Respondent determined not to assign Phillips any work because he was a union organizer. This admitted fact, in and of itself, supports an inference that a contributing factor in the Respondent's decision not to hire King and Dooley was their union organizer status. In finding antiunion animus, we also rely on Bale's unlawful threat that he would move the Company or replace the drivers with owner-operators to avoid unionization.[6]

In sum, we find that the General Counsel established that the Respondent discriminatorily refused to hire Dooley and King consistent with the three elements set forth in *FES*. Therefore, it was the Respondent's burden to show that it would not have hired either of them regardless of their protected status.[7] The Respondent's defense with respect to King is simply that it never received his application. The judge credited the testimony of King and Dooley that on April 8 they filled out their applications at the Respondent's office and submitted them personally to Doug Anderson, the Respondent's general manager. Therefore, we reject the Respondent's contention that it never received the application and we conclude that the Respondent's refusal to hire King violated Section 8(a)(3) and (1).

Concerning Dooley, the Respondent first contended in a June 1997 statement submitted to NLRB Region 28 that he was not hired because of a lack of recent driver experience, because of inaccuracies in his application, and because his then-current job with the Union paid more than the Respondent would pay him as a driver. At the hearing, General Manager Anderson testified that the first two points above were not actually the reasons for failing to hire Dooley. Indeed, the record establishes that the Respondent has hired employees whom it knew had falsified their applications. Anderson maintained that the salary issue was the true reason. Later, he testified that Dooley's arrogance at the time he submitted his application was also a significant reason for denying him employment.

Based on the foregoing, the judge found that the evidence demonstrated shifting, pretextual rationales for not hiring Dooley, and he discredited Anderson's testimony. We agree and find that the Respondent did not rebut the General Counsel's showing that Dooley was hired for unlawful, discriminatory reasons. Accordingly, Respondent's refusal to employ him violated Section 8(a)(3) and (1).

REMEDY

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act, we shall order that it cease and desist from these violations and that it take appropriate affirmative action designed to effectuate the policies of the Act. The

[6] We find it unnecessary to rely on any other evidence which the judge found demonstrated animus.

[7] We find no merit in the Respondent's contention that the judge improperly limited its ability to prove that Phillips and Dooley were not protected by the Act. The Respondent sought to establish that (1) Phillips filed applications with several employers at the same time in April 1997 and that in October 1997, while employed by the Respondent, he engaged in a short economic strike and a subsequent unfair labor practice strike; (2) that after being denied employment, Dooley attempted to convince an employee of the Respondent to go to work for a union contractor; and (3) that 30 applicants appeared outside the Respondent's office when King and Dooley applied for work. Even if it had been properly presented and credited, Respondent's evidence would not have been sufficient to deny Phillips and Dooley the protection of the Act. See *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995); *M. J. Mechanical Services*, 324 NLRB 812, 813–814(1997); *Braun Electric Co.*, 324 NLRB 1, 3 (1997).

appropriate remedy for the refusals to hire Dooley and King is "a cease-and-desist order, and an order to offer the discriminatees immediate reinstatement to the positions to which they applied or, if those positions no longer exist, to substantially equivalent positions, and to make them whole for losses sustained by reason of the discrimination against them." *FES*, supra, at 12. We shall also order the Respondent to make Phillips whole for any losses he may have incurred because of the discrimination against him from the time he was hired on April 8, 1997, until the time the Respondent first began to assign him work, on or about August 15, 1997. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and shall be reduced by net interim earnings, with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Remedial issues concerning the applicability of *Dean General Contractors*, 285 NLRB 573 (1987), may be raised in the compliance proceeding.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set out in full below, and orders that the Respondent, Casino Ready Mix, Inc., Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that it will move its business or replace its drivers with owner-operators rather than permit its drivers to unionize.

(b) Discouraging employees from engaging in activities on behalf of a labor organization by refusing to hire job applicants or refusing to assign work to employees because they are union members or supporters, or because they are union organizers.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer William Dooley and Wayne King employment in the positions for which they applied, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges.

(b) Make Charles Phillips, William Dooley, and Wayne King whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire King and Dooley and the unlawful refusal to assign work to Phillips, and within 3 days thereafter notify these individuals in writing that this has been done and that the refusals to hire and the refusal to assign work will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.[8]

(e) Within 14 days after service by the Region, post at its Las Vegas, Nevada facility copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and job applicants are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 8, 1997.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

CHAIRMAN HURTGEN, dissenting in part.

I disagree with my colleagues' adoption of the judge's finding that Respondent's owner and President, Gary Bales, violated Section 8(a)(1) in a statement to employee Scott Newcomb. As my colleagues acknowledge, the complaint does not allege that Bales' statement violated the Act. My colleagues nonetheless find the viola-

[8] We have modified this paragraph of the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co*., 335 NLRB 142 (2001).

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

tion because, in their view, there is a "close connection" between the statement and allegations of the complaint. I disagree. The complaint contains *no* allegations whatsoever concerning Bale's conduct. The complaint alleges only that Bale is an agent of Respondent. Based on this allegation, my colleagues say that "Respondent was on notice that the General Counsel would hold the Respondent accountable for conduct committed by Bale." In my view, if the General Counsel wanted to hold Respondent accountable for conduct of Bale, he would have at least set forth what that conduct was.

My colleagues say that the above matter was "fully and fairly litigated." It is difficult to say that an allegation is fairly litigated where, as here, it was never made.

My colleagues then say that Bale's statement showed animus and was thus relevant to the 8(a)(3) allegations. Although I agree that this is so, it does not show such a close connection to the complaint as to condemn that statement under Section 8(a)(1).

Finally, my colleagues say that Respondent did not object to Newcomb's testimony and could have cross-examined with respect to it. However, one does not ordinarily defend against that which is not alleged. If the General Counsel had moved to amend the complaint, Respondent could have cross-examined and called rebuttal witnesses. But the General Counsel did not even take that minimal step.

In my view, if the General Counsel wishes to amend the complaint, he should do so at trial so that the Respondent can offer any defense that it might have. That is fundamental due process. Since fundamental due process was not accorded, I would not find the violation.

I agree with the majority in all other respects.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten our employees that we will move our business or replace our drivers with owner-operators rather than permit them to unionize.

WE WILL NOT discourage our employees from engaging in activities on behalf of a union by refusing to hire job applicants or refusing to assign work to employees because they are union members or supporters, or because they are union organizers.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, offer William Dooley and Wayne King employment in the positions for which they applied, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges.

WE WILL make Charles Phillips, William Dooley and Wayne King whole for any loss of earnings and other benefits resulting from the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to hire Dooley and King and the unlawful refusal to assign work to Phillips, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the refusals to hire and the refusal to assign work will not be used against them in any way.

CASINO READY MIX, INC.

Scott B. Feldman, Atty., for the General Counsel.
James T. Winkler, Atty. (Littler, Mendelson, Hicks & Walt), of Las Vegas, Nevada, for the Respondent.
Barry S. Jellison and *Joni S. Jacobs, Attys. (Davis, Cowell & Bowe), of* San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

FREDRICK C. HERZOG, Administrative Law Judge. This case was heard by me in Las Vegas, Nevada, on March 26–27, 1998, and is based on a charge (subsequently amended), filed by Building Trades Organizing Project on behalf of Teamsters, Chauffeurs, Warehousemen and Helpers, Local 631, affiliated with International Brotherhood of Teamsters, AFL–CIO, and International Union of Operating Engineers, Local 12, AFL–CIO (the Union), on July 21, 1997, alleging generally that Casino Ready Mix, Inc. (Respondent), committed certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (29 U.S.C. §151 et seq.) (the Act). On September 29, 1997, the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging violations of Section 8(a)(1) and (3) of the Act. Respondent thereafter filed a timely answer to

the allegations contained within the complaint, denying all wrongdoing.

All parties appeared at the hearing, and were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally and file briefs. Based upon the record, my consideration of the briefs filed by counsel for the General Counsel, counsel for the Charging Party, and counsel for Respondent, and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges that Respondent is a Nevada corporation, with an office and place of business in Las Vegas, Nevada, where at all times material herein it has been engaged in the business of preparation, nonretail sale, and distribution of ready-mix concrete and related products; and that during the 12-month period ending April 30, 1997, in the course and conduct of its business operations, it purchased and received at its facility mentioned above products, materials, and goods valued in excess of $50,000 directly from points outside the State of Nevada.

Accordingly, I find and conclude that Respondent is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Union is now, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Issues

The complaint alleges that the Respondent, through its agents and supervisors, refused to hire three qualified job applicants because of their support for the Union and their union activities, refused to provide available work opportunities to an employee because of his union activity; interrogated employees about their union activity; threatened applicants with refusals to hire if they supported the Union; and threatened employees with plant closure if they selected the Union as their collective-bargaining representative.

Respondent has admitted not giving work opportunities to employee Charles Phillips solely because he was a union organizer, but has claimed justification as to why it didn't hire Bill Dooley.

Respondent offered no evidence to contradict the General Counsel's evidence that Larry Hildebrand unlawfully interrogated and threatened a job applicant, but contends that Hildebrand was not a supervisor whose statements are attributable to Respondent. More, Respondent offered no evidence to contradict evidence of violations of Section 8(a)(1) of the Act.

B. The Facts

During the period April 1–13, 1997, Respondent ran ads in Las Vegas newspapers, seeking to hire drivers. Requisite qualifications, as specified in its ad, were "CDL with clean record" and knowledge of pneumatics. Applicants were directed to come to Respondent's office or send an application by facsimile.

On March 28, 1997, Charles Phillips went to Respondent's office to apply for a ready-mix driver position. Phillips intentionally misrepresented his experience on his application, to make it look like he had more recent experience in the industry and to hide his union involvement.

On April 7, Doug Anderson, Respondent's general manager, called and left a message at Phillips' home, that if Phillips was still interested in a position, he should come in for a "ride along," (i.e., a test drive), and drug test. Phillips called Doug Anderson, Respondent's general manager, back at 7:30 a.m. on April 8, and was told that if he came in by 1 or 2 that afternoon, he could do the "ride along" and drug test that day.

Phillips arrived at about 12:30 p.m., and after tracking down the appropriate person, was given the "ride along" test by Larry Hildebrand. After the "ride along," Hildebrand told Phillips he had done fine, and told him to go and see Heather, the secretary, to schedule the drug test. Phillips then talked to Anderson, who explained the wages and benefits, the importance of keeping the trucks clean, and how to use the night dispatch line to learn of his assignments; Anderson gave Phillips his business card with the night dispatch number.

Expecting to be referred for work as soon as his drug test results came back, Phillips called Respondent's office several times over the next few days, and was finally told that he had passed. Even so, when he called the night dispatch line, there were no assignments for him. Finally, on or about April 14 or 15, Phillips went to Respondent's office to talk to Anderson. Anderson, who appeared to be in the process of interviewing another applicant, told Phillips that the jobs had dried up and there wasn't much going on.

In reality, according to Anderson's admissions, was that Anderson learned that Phillips was a union organizer and had decided to put his application "on hold." Phillips was not referred for work until August. Anderson admitted that after Phillips took his drug test and driver evaluation, he was planning on hiring him. However, after initially planning on hiring Phillips, he found out from another employee that Phillips was a union organizer, and, solely because of this factor, Phillips' application was "put on the back burner."

On April 8, 1997, Bill Dooley went to Respondent's office, along with Wayne King and approximately 30 other applicants, to apply for a driver position. Dooley was not the leader of the group. He played no part in organizing the arrival at the office, arrived there by himself, and was neither elected nor appointed to be spokesperson for the group.

Dooley, King, and a third applicant entered the office while the others waited outside, and found Anderson and a female clerical employee inside. Both Dooley and King were dressed in shirts identifying them as organizers for Teamsters Local 631, and baseball caps with Teamsters' insignia and/or slogans on them. Dooley informed Anderson that he was there to apply for a position, and asked for an application. Dooley mentioned that there were more employees outside.

As Respondent did not have enough applications on hand, Anderson and the clerical employee made up more applica-

tions, and Anderson took them outside to distribute them among the applicants, answering questions about available positions. Anderson identified the people outside as Union people.

Meanwhile, Dooley and King stepped outside to complete their applications. Both men completed their applications in an accurate, truthful manner, providing information to the best of their ability and with no intent to falsify or misrepresent their experience. Dooley had 9 years experience in the ready-mix industry and a CDL with all necessary endorsements, including for hazardous materials. He also truthfully noted on his application that he was currently employed as an organizer for Local 631, and that he was leaving that position to seek to organize Respondent's employees. King had 6 years experience in the ready-mix industry and a CDL with all necessary endorsements, including for hazardous materials. He truthfully noted that he currently worked for Local 631, and listed his Union organizing under "special skills."

When Dooley and King completed their applications, they went back in the office and presented them to Anderson. Anderson looked at the applications, and told Dooley and King that Respondent was not hiring. This was not true, as Anderson knew there was an opening for a ready-mix driver at the time. Dooley asked how long the company kept applications on file, and Anderson answered 6 months. Dooley asked Anderson to give him a call "any time" to interview for a position.

Neither Dooley nor King were ever contacted about a job with Respondent, although both would have taken a position had one been offered.

Instead of hiring Dooley or King, Anderson offered the position to Glenn Williams, who submitted an application the next day. Anderson admitted that he knew when he offered the job that Williams had lied on his application, indicating that he had voluntarily left his position at Silver State because he could not get enough hours, when he had actually been fired for not wearing his uniform and not completing certain paperwork.

Williams did not accept the position, so Anderson offered it to Paul Swisher. Swisher had applied to Respondent on April 14, and was hired and started work on April 16, after completing the "ride along" that same day.

During the period April 15-21, Respondent hired three other applicants, none of which identified themselves as union supporters or had worked for companies under contracts with any unions, and all of whom had less experience driving ready-mix trucks than Dooley and King.

While Hildebrand conducted the "ride along" with Swisher, he asked Swisher if one of his former employers, Nevada Ready Mix, was Union. When Swisher said it was, Hildebrand asked him if he was still Union. As the two pulled into a job site where Phillips and other union organizers were handing out flyers, Swisher asked Hildebrand what would happen if the Union came in. Hildebrand replied, "[W]e'll just take up the company and move back to Irvine." Hildebrand told Swisher his job was to "weed out" union drivers.

Hildebrand's comments to Swisher were echoed by a similar conversation that employee Scott Newcomb testified to. In the late summer or early summer of 1997, Newcomb was in the batch office with Respondent's owner, Gary Bale, and other persons including Albert San Nicolas. Bale was talking about the Union, and said that Respondent would never go union. Bale said that if the Union came in, he move the company or replace the drivers with owner-operators.

The above recital of facts is taken from the undisputed, and seemingly credible, testimonies of employees Dooley, King, Swisher, Newcomb, and Phillips. I note that much of it is corroborated by the admissions made by Anderson.

I also note that neither Bale nor Hildebrand were called to testify by Respondent, and no explanation for the failures to call them was offered by Respondent. From this, I infer that, had they been called, their testimonies would have proven unfavorable to Respondent's position herein, and would not have served to controvert the testimony of the employees mentioned above. *Grimmway Farms*, 314 NLRB 73, 73 fn. 2 (1994); *Control Services*, 314 NLRB 421, 421 (1994).

Accordingly, I take it to be clearly established that the facts recited above occurred in this case.

C. Discussion and Conclusions

1. Section 8(a)(1)

Since Respondent denies that it is responsible for the remarks of Hildebrand, and claims that he is simply a "more experienced" employee, I shall examine his status to determine whether or not he was a supervisor under the Act.

According to the credited testimony of Newcomb, who is a driver still working for Respondent, Hildebrand is Respondent's "number one driver," it's highest paid driver, most senior driver, and is responsible for administering 80 to 90 percent of all employee road test evaluations.

Anderson testified that in addition to an employee interview, employees are required to pass a drug test, and the road test evaluation before they are hired. If employees do not receive a favorable road test evaluation from Hildebrand, they are not hired by Respondent. Anderson admitted that he routinely has conversations with Hildebrand regarding a driver's evaluation and that in these conversations Hildebrand will express his opinion as to the ability of the driver. Whenever Hildebrand has not given a favorable evaluation, the driver was not hired.

Anderson testified that Hildebrand administered the road test evaluation to employee Homero Solano. Anderson testified that Solano was required to pass this evaluation before he was hired and that he was required to pass the evaluation to the satisfaction of Hildebrand. Anderson stated that Solano would not have been hired if he had not passed his evaluation. In the case of Solano's evaluation, Hildebrand signed his driver proficiency form as a "supervisor." This form indicates that Hildebrand was required to evaluate Solano in several different categories and have the driver prove, to Hildebrand's satisfaction, that he was proficient in operating a ready-mix vehicle.

Hildebrand also completed a driver evaluation and proficiency form for Mike Brasier. Brasier was thereafter hired by Respondent. Finally, Charles Phillips testified that after administering his driver evaluation, Hildebrand gave him a favorable recommendation to both Respondent's Batchman and Anderson. Consequently, Phillips was hired by Respondent.

Newcomb also testified to Hildebrand's authority and ability to recommend disciplinary actions. On February 3, 1998,

Newcomb was warned by Hildebrand about improperly dumping wash water. The following day, Newcomb received a disciplinary warning for dumping wash water in an unauthorized area. Besides Hildebrand, there was no member of Respondent's management who witnessed Newcomb's improper activity. Newcomb also testified that about a month earlier, he had been warned by Hildebrand about improperly dumping water. Newcomb's testimony in this regard is unrebutted.

Finally, Anderson testified that Hildebrand will always be the first person on a particular job and, therefore, has certain duties indicative of his authority. Anderson stated that as the first person on a job, Hildebrand is required to inform drivers how to enter and exit the job, where they should wash up, and any specifics directly related to that job. Further, Anderson testified that if drivers have a problem, he encourages drivers to direct those problems to Hildebrand and prefers that Hildebrand resolve those problems.

Anderson testified that after the initial driver evaluation by Hildebrand, Respondent does not conduct follow up evaluations.

This evidence persuades me to find, and I hereby do, that Larry Hildebrand effectively recommends the hiring of Respondent's drivers and effectively recommends disciplinary actions. Accordingly, I further find that Hildebrand is now, and at all times material herein has been, a supervisor and agent of Respondent within the meaning of Section 2(11) and (13) of the Act. Respondent, therefore, is liable for unfair labor practices committed by him.[1]

This leads to the finding, which I hereby make, that Respondent violated Section 8(a)(1) of the Act when Hildebrand interrogated Swisher about his union sympathies. Section 8(a)(1) of the Act was also violated by Hildebrand's threat that Respondent would close its facility in Nevada and move back to California if the Union were selected by employees. In this connection, it is a direct revelation of Respondent's animus toward unions for Hildebrand to reveal to an employee, as I find and conclude that he did when talking to Swisher, that it was his job to "weed out" union drivers.

I further find that Bale's comments, overheard by Newcomb, to the effect that the company would never go union, but would, instead, move back to California, are both violative of Section 8(a)(1) and are revealing of Respondent's animus.

[1] Even if I were not to find that Hildebrand possessed and used supervisory authority, I would still find that Respondent is liable for his words and actions. The evidence clearly establishes that Hildebrand was cloaked by Respondent with apparent authority to manage, so that employees could only reasonably believe that he spoke for management. Thus, he is the Respondent's agent, and Respondent is liable for his conduct. *Victor's Cafe 52, Inc.,* 321 NLRB 504, 513 (1996).

2. Section 8(a)(3)[2]

An employer's refusal to hire a job applicant may violate Section 8(a)(3) and (1) of the Act if the refusal is based upon the employee's union affiliation. *Fluor Daniel, Inc*., 311 NLRB 498, 500 (1993)

The elements of a discriminatory refusal to hire are:

(1) the employment application;
(2) the refusal to hire;
(3) a showing that the applicant was a union supporter or sympathizer;
(4) evidence that the employer knew of the applicant's union support;
(5) maintained an animus against the union; and
(6) refused to hire the applicant due to such animus.

Aneco, Inc., 325 NLRB 400 (1998); *Blaylock Electric*, 319 NLRB 928, 931 (1995); *Big E's Foodland, Inc.,* 242 NLRB 963, 968 (1979).

At the outset, it should be noted that several facts in this case are undisputed. Here, they are:

1. Dooley, King, and Phillips submitted applications for employment;
2. Respondent refused to hire Dooley and King;
3. Respondent refused to put Phillips to work; and,
4. Respondent knew all three were active Union supporters.

In addition, as shown above, Respondent harbored *animus* against the Union and, therefore, against Dooley, King, and Phillips.

Anderson's testimony that Phillips was not put to work because he was a union organizer not only establishes a violation of the Act with respect to Phillips, it is also strong evidence that Respondent refused to hire Dooley and King for the same reason.

Respondent's evidence does not lead to the conclusion that although it did not put Phillips to work because of his union activity, Respondent had a different, lawful motive with respect to Dooley and King. Nor would my sense point toward a different inference than that since Phillips was discriminated against because of his union activity, so were Dooley and King.

The Board will conclude that if Respondent acts in a disparate manner, it is evidence that Respondent's alleged reasons for its actions are pretexts advanced to hide its true motive. *Aneco, Inc.,* supra (citing *John P. Bell & Sons*, 266 NLRB 607, 610 (1983)). Anderson testified that the reason Dooley was not hired was because Anderson was aware that he was being paid by the Union and that he believed that Dooley would not accept Respondent's pay rate. However, Anderson's testimony is belied by the fact that Anderson was aware that Phillips was

[2] At trial I limited Respondent's right to secure certain evidentiary material from the General Counsel, and I also made certain generalized comments concerning what materials I thought to be relevant. However, I limited my ruling and reserved the right to rule on particular disputes at appropriate times. I specifically declined to rule that "salters" are entitled to lessened or fewer protections than are other employees.

paid by the Union and, nonetheless, offered him a position in August. As the Board held in *Aneco*, such evidence of disparate treatment is evidence of Respondent's unlawful intent.

The fact that Dooley and King, as well as Phillips, were all discriminated against due to their union activity becomes even more evident in light of Respondent's shifting and pretextual explanations Respondent has offered with respect to Dooley. Shifting explanations are evidence of pretext.

A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not, in fact, relied upon, thereby leaving intact the inference of wrongful motive. *International Carolina Glass*, 319 NLRB 171, 174 (1995). Anderson's testimony shows that Respondent offered several reasons for its actions towards Dooley, then retreated from those initial explanations, and subsequently put forth a completely new, never-before-heard, explanation.

Respondent first asserted that Dooley was not hired because of his lack of recent experience, his inaccurate application and his higher wage with the Union. During the hearing, however, Anderson admitted that the first two reasons were in fact not the real reasons for Respondent's conduct. Anderson then stated that the real reason Dooley was not hired was because of his alleged arrogance while applying.

Thus, Respondent has offered three distinct explanations for why Dooley was not hired. Such shifting explanations require the inference that Respondent's explanations are all pretextual, and Respondent's true motives were unlawful. *Shattuck Denn Mining v. NLRB*, 362 F.2d 466 (9th Cir. 1966).

Accordingly, I have concluded that the General Counsel has established a strong prima facie case with regard to each of the three alleged discriminatees.

Once the General Counsel has established this *prima facie* case, the burden shifts to the employer to show that it would not have hired the applicants even in the absence of their Union affiliation. *TIC–The Industrial Co. Southeast*, 322 NLRB 605, 609–610 (1996). If the reasons offered do not exist or were not in fact relied upon, then the employer has not met its burden. Id. at 610. See also *Fluor Daniel, Inc*., supra, 311 NLRB at 498.

As recited above, the General Counsel met its *prima facie* case with respect to all alleged discriminatees. Each of them put in an application at a time when Respondent was hiring; each was qualified for the job of ready-mix driver; and each was ready and willing to accept a position should one be offered. Indeed, Anderson himself admitted that both Dooley and Phillips were qualified for the position.

Respondent had clear knowledge of each applicant's Union status at the time it refused to either hire him or refer him for work. Both Dooley and King were dressed in Union-identifying clothing, and had prominently disclosed their Union affiliation on their written applications. Anderson admitted that he knew everyone who applied as part of the group on April 8 was with the Union. Although Phillips hid his union status, Anderson admitted that he learned of it after he accepted the application.

Thus, there is ample, uncontradicted evidence both that Respondent harbored *animus* and that it acted on it when not hiring the applicants at issue. Anderson admittedly failed to refer Phillips for work solely because he was a Union organizer. Anderson also admittedly failed to interview or consider any of the applications received on April 8, because he didn't consider them "serious" about applying for work simply because they applied *en masse* as part of a union tactic. Instead of hiring Dooley, Anderson offered the position to someone with less experience whom he knew had lied on his application. This demonstrates the lengths Anderson could go to avoid having a qualified union organizer. Anderson continued this pattern by hiring three other persons during the same time period who had no known union affiliation and less relevant work experience than Dooley and King.

Further, as found above, Respondent's owner and agent made anti-Union statements during the time period it refused to hire and refer work to the discriminatees. Bale told employees that he would close up or hire owner-operators if the Union came in. And, also as found above, supervisor Hildebrand told Swisher that part of his job was to "weed out" union drivers, and that the company would go back to Irvine if the Union came in. Respondent did not call either Hildebrand or Bale to refute this testimony, or offer any counter evidence.

Respondent also allowed Hildebrand to circulate and collect signatures on a petition attempting to keep out the Union. Hildebrand told employees if they signed the petition, they'd get a raise. Newcomb signed the petition in the time office. Anderson admitted that he knew of the petition, but denied knowing what it was about. It is just not credible that, as Anderson claimed, Hildebrand would ask to use company resources to type up and distribute a petition without telling Anderson what the petition was for. Not coincidentally, shortly after this Hildebrand got a raise while no other drivers did.

Indeed, Respondent's *animus* was so prevalent and well-known among its employees that they even reported union organizers to Anderson. Anderson learned of Phillips' union status only after an employee, who knew Anderson was about to hire Phillips, told him. Why would an employee tell a manger that unless he knew it was a piece of information the manager would find pertinent in making the decision to hire?

As Anderson admitted that the sole reason he did not hire Phillips in April 1997 was because of his union status, the inquiry as to this violation ends. It further provides evidence that the same unlawful motivation was behind Anderson's failure to hire Dooley and King.

Respondent has offered various, shifting reasons for its refusal to hire Dooley. In a position statement to Region 28 dated June 23, 1997 . . . time enough to fully reflect on its reasons for not hiring Dooley more than 2 months earlier . . . Respondent claimed that it had not hired Dooley because of his lack of recent experience, errors in his employment application, and the fact that he was currently being paid more than Respondent was willing to pay.

Anderson admitted at the hearing that the first two reasons were false, as they would have been and, in fact, were, overlooked for other applicants. Anderson's admission that two originally-proffered reasons were false leads to the inference that Respondent wished to conceal a true, unlawful motive. *Fluor Daniel, Inc.,* supra, 311 NLRB at 498; *TIC–The Industrial Co. Southeast,* supra, 322 NLRB at 610.

Finally, Anderson stated that in August, he again evaluated Dooley's application for employment, and again refused to hire him. Anderson testified that a consideration in not hiring Dooley as a driver was because of the Board charges that had been filed regarding his original application for employment. Such testimony is a clear example of animus against the Union.

Summarizing, I find and conclude that counsel for the General Counsel has succeeded in proving that Conroy was disciplined by Respondent in violation of Section 8(a)(3) and (1) of the Act. I so find and conclude.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) and (3) of the Act by refusing to employ Charles A. Phillips, William Dooley, and Wayne King because they joined, supported, or assisted the Union.

4. Respondent violated Section 8(a)(1) of the Act by interrogating employees about their union membership, activities, and sympathies; by threatening to refuse to hire them because of their union membership, activities, and sympathies; and, by threatening to close its facility if employees selected the Union as their bargaining representative.

5. The above unfair labor practices have an effect upon commerce as defined in the Act.

[Recommended Order omitted from publication.]